

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Protecting and Promoting the Open Internet)	GN Docket No. 14-28
)	
Guidance on Open Internet Transparency)	DA 16-569
Rule Requirements)	

**COMPETITIVE CARRIERS ASSOCIATION REPLY TO COMMENTS ON
APPLICATIONS FOR REVIEW**

Competitive Carriers Association (“CCA”) respectfully submits this Reply¹ to comments filed in response to CCA’s Application for Review and CTIA’s Application for Review (together, the “Applications for Review”) of the Public Notice issued on May 19, 2016 by the Chief Technologist, Office of General Counsel, and Enforcement Bureau (collectively, the “Bureaus”) in the above-captioned proceeding (the “Public Notice”).² Based on the lack of opposition in the record, along with the reasons set forth in the Applications for Review, the Applications for Review should be granted.

DISCUSSION

On June 20, 2016, CCA and CTIA filed respective Applications for Review of the Public Notice. The Applications for Review describe how the Public Notice unlawfully establishes substantive new rules on top of the existing transparency disclosure requirements for mobile

¹ See 47 C.F.R. § 1.115.

² *Guidance on Open Internet Transparency Rule Requirements*, GN Docket No. 14-28, Public Notice, DA 16-569 (rel. May 19, 2016) (“Public Notice”); Application for Review of the Competitive Carriers Association (filed June 20, 2016); Application for Review of CTIA, GN Docket No. 14-28 (filed June 20, 2016).

broadband Internet access service (“BIAS”) providers adopted by the *2010 Open Internet Order*³ and the *2015 Open Internet Order*.⁴ As stated in the Applications for Review, to promulgate these new rules, the FCC should have issued a notice and comment rulemaking proceeding pursuant to the Administrative Procedures Act (“APA”). Specifically, CCA and CTIA challenged the legality of the following issues pertaining to mobile BIAS providers: (1) the imposition of a network performance measurement standard based upon Cellular Market Areas (“CMAs”); (2) the mobile Measuring Broadband American safe harbor (“mobile MBA safe harbor”); and (3) a new standard of conduct requirement for point of sale disclosures.

There were no substantial objections to CCA’s and CTIA’s Applications for Review. RootMetrics, Nielsen and the American Cable Association (“ACA”) were the only parties to file comments in response to the Applications for Review, all of which support initiating a rulemaking proceeding to develop the record on the guidance provided to mobile BIAS providers.⁵ Rootmetrics and Nielsen, performance data industry experts, supported the Applications for Review and cast an especially critical eye on the quality of data and analytical methodologies belying the mobile MBA program.⁶ RootMetrics agreed that “the Applications

³ *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010) (“*2010 Open Internet Order*”), *aff’d in relevant part Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁴ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, 30 FCC Rcd 5601 (2015) (“*2015 Open Internet Order*”), *aff’d USTA v. FCC*, No. 15-1063 (D.C. Cir. June 14, 2016).

⁵ See Comments of RootMetrics, GN Docket 14-28 (filed June 27, 2016) (“RootMetrics Comments”); Comments of Nielsen Holdings plc (“Nielsen Comments”), GN Docket 14-28, at 2 (filed July 5, 2016); Comments of American Cable Association, GN Docket 14-28, at 6 (filed July 5, 2016) (“ACA Comments”).

⁶ See, e.g., RootMetrics Comments at 4 (noting “the MBA program tests circumstances that are not representative of the overall U.S. wireless environment,” and describing the flaws inherent to crowd-sourced data); see also, e.g., Nielsen Comments at 5 (“the Commission should consider designating additional, highly-qualified data measurement

for Review should be granted so that the full Commission can develop the record needed to ensure that any safe harbor the FCC adopts accurately reflects the real-world characteristics of consumer mobile broadband services.”⁷ Nielsen urged the Commission to “seek comment on designating additional safe harbors and the benefits to consumers that doing so would produce.”⁸ ACA noted that while the guidance surrounding fixed services should remain, “the Commission can and should initiate a rulemaking only on those portions of the guidance” pertaining to mobile BIAS provided as outlined in the Applications for Review.⁹ In addition, as Mosaik explains, had the Commission sought comment on the guidance, it “would likely have realized that allowing the use of a greater variety of data sources and collection technologies would ensure more detailed, robust and accurate wireless network-performance measurements.”¹⁰ Mosaik further underscores how the Commission would betray customer trust by adopting “a single...method

programs as safe harbors for purposes of compliance with the Open Internet transparency rules...[I]t seems a disservice to consumers to encourage providers to report based on an untested and questioned solution when other solutions are not only available but already in use”).

⁷ RootMetrics Comments at 2; *see id.* at 2-4 (the MBA program’s reliance on unreliable methodologies and data sources undermine the validity of the program’s results); *see also id.* at 5-7 (requiring carriers to disclose actual performance metrics on a CMA basis will produce misleading results); *see also id.* at 7-10 (the MBA program is not sound enough, in terms of employing appropriate statistical methods and data interpretation, to serve as a safe harbor).

⁸ Nielsen Comments at 2.

⁹ ACA Comments at 6.

¹⁰ *Ex Parte* Letter from Bryan Darr, President & CEO, Mosaik, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, 1 (filed July 15, 2016) (“Mosaik Letter”); *see id.* at 3 (reporting data averaged across CMAs “can produce misleading results,” which will be further exacerbated by the fact that the data is crowd-sourced by a group unlikely to represent the U.S. population overall. Mosaik argues “the data must be collected in an organized and systematic way, not merely aggregated and averaged, and then processed in conjunction with other performance measurement tools”).

offered by a single preferred vendor as the sole safe harbor for broadband-performance measurement,” which might establish an environment wherein “customers hav[e] access to less current and less accurate information about wireless carriers’ network performance than they enjoy today.”¹¹ These substantive problems with the rules promulgated in the Public Notice surely merit full examination in the public record.

Since the record in this proceeding supports a grant of the Applications for Review, the Commission should rescind the Public Notice and initiate a rulemaking affording appropriate notice and opportunity for comment.

CONCLUSION

For the foregoing reasons, CCA respectfully requests that the Commission grant the Applications for Review and take the recommended actions discussed therein.

Respectfully submitted,

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¹¹ Mosaik Letter at 5.

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2016, I caused the foregoing Reply to be sent by U.S. Mail to the following parties:

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